



**OREGON DEPARTMENT OF LAND CONSERVATION AND
DEVELOPMENT**

**ORS 195.300 to ORS 195.336 (MEASURE 49) SUPPLEMENTAL REVIEW
OF MEASURE 37 CLAIM
Preliminary Evaluation**

September 17, 2008

STATE ELECTION NUMBER: E118733

CLAIMANTS: Robert and Betty Naglee
31178 SW Riverwood Dr
West Linn, Oregon 97068

**MEASURE 37 PROPERTY
IDENTIFICATION:** Township 3S, Range 1E, Section 22CB
Tax lots 100, 200, 3701, 3702 & 3703¹
Clackamas County

I. ELECTION

The claimants, Robert and Betty Naglee, filed a claim under ORS 197.352 (2005) (Measure 37) on July 8, 2005, for property located at 31178 SW Riverwood Drive, near West Linn, in Clackamas County. ORS 195.300 to ORS 195.336 (Measure 49) entitles claimants who filed a Measure 37 claim to elect supplemental review of their claim under either Section 6 (Express option) or 7 (Conditional option) of Measure 49. The claimants have elected supplemental review of their Measure 37 claim under the Express option. The Express option authorizes the Department of Land Conservation and Development (the department) to issue up to three home site approvals to qualified claimants.

II. SUMMARY OF PRELIMINARY EVALUATION

Based on the department's preliminary analysis, it appears that the claimants are qualified for up to either two or three home site approvals on the Measure 37 claim property, depending on whether public water service was available to the property in 1977. The claimants' property, including both the Measure 37 claim property and all contiguous property in the same ownership, currently appears to consist of one parcel, which is developed with one dwelling. After taking into account the number of lots, parcels and dwellings currently located on the Measure 37 claim property and the contiguous property under the same ownership, it appears that the home site approvals will allow the claimants to establish either one or two additional

¹ While the Measure 37 claim was for five tax lots, information obtained from Clackamas County indicates that tax lots 100, 200, 3701, 3702 and 3703 are actually one legal lot of record.

parcels and one or two additional dwellings on the Measure 37 claim property, depending on the availability of public water service to the property at the time the claimants acquired the property in its entirety in 1977.

III. THE MAXIMUM NUMBER OF HOME SITE APPROVALS FOR WHICH THE CLAIMANTS MAY QUALIFY

Under the Section 6 Express option, the number of home site approvals issued by the department cannot exceed the lesser of the following: three; the number stated by the claimant in the election materials; or the number described in a Measure 37 waiver issued by the state, or if no waiver was issued, the number of home sites described in the Measure 37 claim filed with the state. The claimants have requested three home site approvals in the election material. The Measure 37 waiver issued for this claim describes four home sites. Therefore, the claimants may qualify for a maximum of three home site approvals under the Section 6 Express option.

IV. PRELIMINARY ANALYSIS OF QUALIFICATION FOR HOME SITE APPROVAL

1. Preliminary Analysis

To qualify for a home site approval under the Section 6 Express option, a claimant must have filed a Measure 37 claim for the property with either the state or the county in which the property is located on or before June 28, 2007, and must have filed a Measure 37 claim with both the state and the county before Measure 49 became effective on December 6, 2007. If the state Measure 37 claim was filed after December 4, 2006, the claim must also have been filed in compliance with the provisions of OAR 660-041-0020 then in effect.

The claimants, Robert and Betty Naglee, filed a Measure 37 claim, M118733, with the state on July 8, 2005. The claimants filed a Measure 37 claim with Clackamas County on July 8, 2005. The state claim was filed prior to or on December 4, 2006.

It appears that the claimants timely filed a Measure 37 claim with both the state and Clackamas County.

In addition to filing a claim with both the state and the county in which the property is located, to qualify for a home site approval under the Express option the claimants must establish each of the following:

(a) The Claimant is an Owner of the Property

Measure 49 defines “Owner” as: “(a) The owner of fee title to the property as shown in the deed records of the county where the property is located; (b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or (c) if the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner.”

According to the deeds and the recorded land sale contract submitted by the claimants, Robert and Betty Naglee are the current owners of fee title to the property as shown in the Clackamas County deed records and therefore, are owners of the property under Measure 49.

(b) All Owners of the Property Have Consented in Writing to the Claim

It appears that the claimants are the sole owners of the property. Therefore, no additional consents are required.

(c) The Measure 37 Claim Property Is Located Entirely Outside Any Urban Growth Boundary and Entirely Outside the Boundaries of Any City

The Measure 37 claim property, tax lots 100, 200, 3701, 3702 and 3703, are located in Clackamas County, at 31178 SW Riverwood Drive, outside the urban growth boundary and outside the city limits of the nearest city, West Linn.

(d) One or More Land Use Regulations Prohibit Establishing the Lot, Parcel or Dwelling

As stated in Section III above, the claimants may qualify for up to three home site approvals.

The property is currently zoned RA-2 by Clackamas County, in accordance with Goal 14, which prohibits the urban use of rural land and requires local comprehensive plans to identify and separate urbanizable land from rural land in order to provide for the orderly and efficient transition from rural to urban use. State laws, namely Goal 14 and OAR 660-004-0040, prohibit the establishment of a dwelling on a lot or parcel less than two acres in a rural residential zone established before October 4, 2000, in which the County specified a minimum lot or parcel size of less than two acres.

The claimants' property consists of 2.57 acres. Therefore, state land use regulations prohibit the claimants from establishing on the Measure 37 claim property the three home sites the claimants may qualify for under Section 6 of Measure 49.

(e) The Establishment of the Lot, Parcel or Dwelling Is Not Prohibited by a Land Use Regulation Described in ORS 195.305(3)

ORS 195.305(3) exempts from claims under Measure 49 land use regulations:

- (a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law;
- (b) Restricting or prohibiting activities for the protection of public health and safety;
- (c) To the extent the land use regulation is required to comply with federal law; or
- (d) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.

Based on the documentation submitted by the claimants, it does not appear that the establishment of the requested three home sites on the property would be prohibited by land use regulations described in ORS 195.305(3).

(f) On the Claimant's Acquisition Date, the Claimant Lawfully Was Permitted to Establish at Least the Number of Lots, Parcels or Dwellings on the Property That Are Authorized Under Section 6 of Measure 49.

A claimant's acquisition date is "the date the claimant became the owner of the property as shown in the deed records of the county in which the property is located. If there is more than one claimant for the same property under the same claim and the claimants have different acquisition dates, the acquisition date is the earliest of those dates."

The Clackamas County deed records indicate that the claimants acquired tax lot 100 (.26 acres) on March 31, 1973, tax lot 200 (.35 acres) on August 27, 1975 and tax lots 3701, 3702 and 3703 (1.96 acres) on July 1, 1977.

On March 13, 1973, when the claimants acquired tax lot 100, the property was subject to Clackamas County's GU zone. That zone remained in effect at the time the claimants acquired tax lots 200, 3701, 3702 and 3703 in August, 1975 and July, 1977. Clackamas County's GU zone required at least 20,000 square feet for the establishment of a dwelling on a lot or parcel, provided that public water service was available. If public water service was not available, the GU zone required a minimum parcel size of one-acre. Tax lot 100, which consists of 11,325 square feet, in itself, was of inadequate size to independently satisfy the minimum lot size requirements of the GU zone. However, in July, 1977, when the claimants had acquired the entire subject property, the property was of sufficient acreage to allow some level of development under the GU zoning standards then in effect.

However, in 1977, the subject property was subject not only to the county's GU zone, but also to the statewide planning goals and implementing regulations then in effect. Because the Commission had not acknowledged the county's comprehensive plan and land use regulations as being in compliance with the statewide planning goals, the statewide planning goals and Goal 14 in particular, applied directly to the claimants' property. For properties acquired after the goals were adopted, but before comprehensive plans were acknowledged for compliance with those goals, the department has determined that the zones adopted in the county's first acknowledged comprehensive plans are the best indicator of what would have been allowed under a direct application of the goals, unless a claimant can establish that direct application of the zones would have permitted more intensive development.

On December 31, 1981, the Commission acknowledged the application of Clackamas County's RA-2 zone to the entire 2.57 acre Measure 37 claim property. The Commission's acknowledgement of Clackamas County's RA-2 zone confirmed that zone's compliance with Goal 14. Clackamas County's acknowledged RA-2 zone acknowledged that property as non-resource exceptions land under Goal 14, and required a minimum of two acres for the creation of a new lot or parcel. Therefore, in 1977, under the acknowledged RA-2 zone, the claimants

lawfully could have established no more than one dwelling on the 2.57-acre property. The claimants therefore would not be qualified for relief under the Express option, unless the claimants can show that a direct application of the land use planning Goals would have allowed the claimants to establish additional dwellings.

The claimants have submitted evidence establishing that direct application of Goal 14 would have allowed development consistent with the county's GU zone in effect in 1977. On December 4, 2007 the claimants received approval from Clackamas County to partition the subject property based on their Measure 37 state and local waivers (File No. Z0623-07-M). The findings in the report include direct application of Goal 14 in effect at the time the claimants acquired the property. The report concludes that the proposed three home sites are consistent with the size and nature of the surrounding rural use development and could meet the intent and purpose of Goal 14 in effect in 1975 and 1977. The department agrees that although the property was ultimately acknowledged to require a minimum of two acres for the creation of a new lot or parcel, the county's GU zone would also have authorized development consistent with the surrounding area, in furtherance of the Goal 14 goal to ensure orderly and efficient transition from rural to urban land. Therefore, development consistent with the requirements of that zone (20,000 square feet with the availability of public water, and one acre where no public water was available) would have satisfied that goal.

The record is not clear whether public water was available to the subject property in 1977. Provided that public water service was available at the time the claimants acquired the entirety of the subject property in 1977, division of the 2.57 acre property into three no less than 20,000 square foot parcels would have lawfully been permitted when the claimants acquired the property. If public water service was not available, the zoning in effect in 1977 would have permitted division of the property into no more than two home sites.

2. Preliminary Conclusion

Based on the preliminary analysis, it appears that the claimants, Robert and Betty Naglee, qualify for up to three home site approvals under the Section 6 Express option of Measure 49, provided they establish that public water was available to serve the property when they acquired it in its entirety in 1977. Otherwise, it appears that the claimants qualify for up to two home site approvals under Section 6.

V. NUMBER OF LOTS, PARCELS OR DWELLINGS ON OR CONTAINED WITHIN THE PROPERTY

The number of lots, parcels or dwellings that a claimant is authorized to establish pursuant to the home site approvals is reduced by the number of lots, parcels or dwellings currently in existence on the Measure 37 claim property and any contiguous property under the same ownership. However, if a claimant otherwise qualifies for relief under the Section 6 Express option, the claimant will be able to establish at least one additional lot, parcel or dwelling regardless of the number of lots, parcels or dwellings currently in existence.

Based on the documentation provided by the claimants, the Measure 37 claim property appears to currently include one parcel and one dwelling. There is no contiguous property under the same ownership. Therefore, provided public water service was available to the property in 1977, the three home site approvals the claimants appear to qualify for under the Express option will allow the claimants to establish up to two additional parcels and two additional dwellings on the Measure 37 claim property. If no public water service was available to the property in 1977, the two home site approvals the claimants would qualify for under the Express option will allow the claimants to establish up to one additional parcel and one additional dwelling. Each dwelling must be on a separate lot or parcel, and must be contained within the Measure 37 claim property.

VI. PRELIMINARY STATEMENT OF PROPOSED LIMITATIONS AND CONDITIONS ON THE NUMBER AND SCOPE OF HOME SITE APPROVALS

The department has identified the following limitations and conditions that may affect the number or scope of the home site approvals that the claimants would otherwise be entitled to under Section 6 of Measure 49. This list may not be comprehensive and does not preclude the possibility that other considerations, not yet identified by the department, may affect land divisions or the establishment of dwellings authorized by the home site approval.

1. The establishment of a land division or dwelling based on a Measure 49 home site approval must comply with all applicable standards governing the siting or development of the land division or dwelling. However, those standards must not be applied in a manner that prohibits the establishment of the land division or dwelling, unless the standards are reasonably necessary to avoid or abate a nuisance, to protect public health or safety, or to carry out federal law.
2. A home site approval will not authorize the establishment of a land division or dwelling in violation of a land use regulation described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14).
3. A claimant is not eligible for more than 20 home site approvals under Sections 5 to 11 of Measure 49 regardless of how many properties a claimant owns or how many claims a claimant filed.
4. The number of lots, parcels or dwellings a claimant may be eligible to establish under a Measure 49 authorization is reduced by the number of lots, parcels and dwellings currently in existence on the Measure 37 claim property and contiguous property in the same ownership, regardless of whether evidence of their existence has been provided to the department. If lots, parcels or dwellings currently exist on the Measure 37 claim property or on contiguous property under the same ownership and the lots, parcels or dwellings have not been disclosed to the department, then the number of additional lots, parcels or dwellings a claimant may establish pursuant to the home site approval must be reduced according to the methodology stated in Section 6(2)(b) and 6(3) of Measure 49.
5. Temporary dwellings are not considered in determining the number of existing dwellings currently on the property. The claimants may choose to convert any temporary dwelling

currently located on the Measure 37 claim property to an authorized home site pursuant to the Measure 49 home site approval. Otherwise, any temporary dwelling is subject to the terms of the local permit requirements under which it was approved, and is subject to removal at the end of the term for which it is allowed.

6. A home site approval only authorizes the establishment of one or more new lots, parcels or dwellings on the Measure 37 claim property. No additional development is authorized on contiguous property for which no Measure 37 claim was filed. Each lot or parcel established pursuant to a home site approval must either be the site of a dwelling that is currently in existence or be the future site of a dwelling that will be established pursuant to the home site approval. The home site approval does not authorize the establishment of a new dwelling on a lot or parcel that already contains one or more dwellings. The claimants may be required to alter the configuration of the lots or parcels currently in existence on the Measure 37 claim property and contiguous property so that each additional dwelling established on the Measure 37 claim property, pursuant to the home site approval, is sited on a separate lot or parcel.
7. Once the department issues a final home site approval, the home site approval will run with the property and will transfer with the property. The home site approval will not expire, except that if a claimant who received a home site approval later conveys the property to a party other than the claimant's spouse or the trustee of a revocable trust in which the claimant is the settlor, the subsequent owner of the property must establish the authorized lots, parcels and dwellings within 10 years of the conveyance. A lot or parcel lawfully created based on the home site approval will remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law. A dwelling lawfully created based on a home site approval is a permitted use.

VII. NOTICE OF OPPORTUNITY TO COMMENT

A claimant or the claimant's authorized agent, a county and any third party may submit written comments, evidence and information in response to the preliminary evaluation. The comments, evidence and information must be filed with the department no more than twenty-eight (28) calendar days after the date this evaluation is mailed to the claimants and the claimants' agent and notice of this evaluation is mailed to third parties.

The department will mail a copy of all materials timely filed by a county or a third party with the department to the claimants and the claimants' agent. A claimant or a claimant's authorized agent may then file written comments, evidence or information in response to the materials filed by the third party or county. That response must be filed no more than twenty-one (21) calendar days after the date the department mails the materials to the claimants and the claimants' authorized agent.

All comments, evidence and information in response to the preliminary evaluation and all responses to materials filed by a third party or a county shall be delivered to Supplemental Measure 49 Claim Review, 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540 and will be deemed timely filed either (1) if actually delivered to the department before the close of business on the final eligible calendar day, or (2) if mailed on or before the final eligible calendar day.

Note: Please reference the claim number and claimant name and clearly mark your comments as "Preliminary Evaluation Comments." Comments must be submitted in original written form only. Comments submitted electronically or by facsimile will not be accepted.